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No. 99-605

Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

WILLIAM THOMAS, *et al.*,

*Petitioners,*

*v.*

NETWORK SOLUTIONS, INC. and
NATIONAL SCIENCE FOUNDATION,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

## REPLY BRIEF FOR PETITIONERS

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## TABLE OF CONTENTS


| | Page |
|---|---|
| Table of Authorities | ii |
| Further Reasons for Granting the Writ | 1 |
| I. Even Congress Cannot Be Exempted From The Constitution | 1 |
| II. A Cooperative Agreement Is Not A License To Ignore The User Fee Statute | 4 |
| Conclusion | 7 |

## TABLE OF AUTHORITIES


| Cases: | Page(s) |
|---|---|
| *Larabee Flour Mills Co. v. Nee*, 12 F. Supp. 395 (W.D. Mo. 1935) | 2 |
| *Loving v. United States*, 517 U.S. 748 (1996) | 2 |
| *Rafferty v. Smith, Bell & Co.*, 257 U.S. 226 (1921) | 3 |
| *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) | 2 |
| *Thomas v. Network Solutions*, 2 F. Supp.2d 22 (1998) | 4 |
| *United States v. Heinszen*, 206 U.S. 370 (1907) | 2, 3 |

## FURTHER REASONS FOR GRANTING THE WRIT

### I. Even Congress Cannot Be Exempted From The Constitution

The framing of the delegation issue in the opposition brief of the National Science Foundation ("NSF") captures the insidious import of the opinion below: "*Where Congress itself acts, the nondelegation doctrine is irrelevant.*" NSF Opp. at 14 (emphasis added). A congressional rubber stamp applied to an agency's unlawful exercise of legislative power thus becomes, under NSF's (and the D.C. Circuit's) reasoning, constitutionally indistinguishable from agency action undertaken pursuant to authority properly delegated by Congress in the first instance. The implications are clear enough. Congress has carte blanche to rubber stamp any agency legislation — even an unlawfully-imposed tax — deemed politically expedient. Congress is freed entirely from its constitutional obligation to provide intelligible principles, guidelines or standards to confine agency discretion. And executive agencies are encouraged to devise, impose, and collect taxes.

The foregoing is patently unconstitutional, however. Congress does not have the authority to bypass separation-of-powers constraints *after* an agency acts, any more than it would have the power to grant open-ended taxing authority to an agency in the first place. Congress can never delegate the unfettered power to legislate, as the Court has repeatedly established:

> [W]ould it be seriously contended that Congress could delegate its legislative authority to trade or industrial associations or groups so as to empower them to enact the laws they deem to be wise and beneficent for the rehabilitation and expansion of their trade or industries? Could trade or industrial associations or groups be considered legislative bodies for that purpose because such associations or groups are familiar with the problems of their enterprises? And could an effort of that sort be

> made valid by such a preface of generalities as to permissible aims as we find in section 1 of title I? The answer is obvious. Such a delegation of legislative power is unknown to our law, and is utterly inconsistent with the constitutional prerogatives and duties of Congress.

*Schechter Poultry Corp. v. United States*, 295 U.S. 495, 537 (1935); *see also Loving v. United States*, 517 U.S. 748 (1996) ("[t]he lawmaking function belongs to Congress . . . and may not be conveyed to another branch or entity").

The constitutional flaw inherent in allowing Congress to do away with the nondelegation doctrine merely by wielding its rubber stamp was exposed with exquisite clarity in *Larabee Flour Mills Co. v. Nee*, 12 F. Supp. 395 (W.D. Mo. 1935) — a decision challenged below for its source, not its reasoning. *Larabee* held that Congress' purported ratification of tax rates imposed by the Secretary of Agriculture was forbidden by the Constitution, as there were no guidelines in place at the time the agency acted. *Id.* at 404-05. As the opinion below does here, the government had argued in *Larabee* that the ratification was effective under *United States v. Heinszen*, 206 U.S. 370 (1907).[1] The *Larabee* court responded:

> In *United States v. Heinszen & Co.* . . . it was ruled by the Supreme Court that Congress would ratify and so legalize tariff duties for the Philippine Islands theretofore established by the President without authority[:] . . . 'That where an agent, without precedent authority, has exercised, in the name of a principal, *a* power which the principal had the capacity to bestow, the principal may ratify and affirm the unauthorized act, and thus retroactively give it validity . . .'

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[1] *See* Memorandum and Order (August 28, 1998), at 7 (J. App. 1600).

> Learned counsel for plaintiffs . . . contend [*Heinszen*] is inapplicable. Congress had the power, they say, in the first instance, to authorize the President to fix tariff duties for the Philippines, and therefore, under the principle stated by the Supreme Court, to ratify what he did. But Congress did not have the power, they argue, to authorize the Secretary to fix processing tax rates and therefore cannot ratify the rates he fixed; the principal cannot ratify what in the first instance it could not have authorized.
>
> *The argument is sound. It cannot be answered.* Congress lawfully could have delegated to the President the power to legislate as to tariff rates for the insular possession of the United States . . . *but it could not lawfully delegate to the Secretary of Agriculture the power to legislate (including the power to fix taxing rates) for the United States.*

*Id.* (emphasis added). For the same reasons, Congress did not have the power to authorize NSF or its agent (Network Solutions, Inc.) to fix Internet taxes, "and therefore cannot ratify the rates [they] fixed; the principal cannot ratify what in the first instance it could not have authorized." *Id.* at 404. "*The argument is sound. It cannot be answered.*" *Id.* at 405 (emphasis added).[2]

The opinion below abrogates the nondelegation doctrine altogether, and thus threatens separation of powers at its core. Petitioner-registrants respectfully submit that the Court should grant the petition for certiorari to address this fundamental constitutional issue.

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[2] *Rafferty v. Smith, Bell & Co.*, 257 U.S. 226 (1921), does not support the opinion below any more than *Heinszen* does, notwithstanding NSF's reliance upon it. *See* NSF Opp. at 12-13. *Smith, Bell & Co.* is readily distinguishable, as it involved Congress' retroactive approval of taxes imposed by the Philippine Legislature, to which the nondelegation doctrine does not even arguably apply. *See id.* at 232.

## II. A Cooperative Agreement Is Not A License To Ignore The User Fee Statute

The serious and far-reaching implications inherent in the D.C. Circuit's refusal to apply the IOAA to the user fees at issue come clear in the opposition brief of Network Solutions, Inc. ("Network Solutions," or "NSI"). In essence, Network Solutions argues that NSF's use of a cooperative agreement (instead of a procurement contract) as the vehicle for this government contract shows that NSI cannot be NSF's "agent," as a matter of law, for purposes of evaluating the applicability of the IOAA. It follows, Network Solutions argues, that a private company authorized to collect user fees under a cooperative agreement may do so at whatever rate that the agency sees fit to authorize — regardless of whether the agency could lawfully charge that rate, under the IOAA, if it collected those fees itself. By the same token, any user who paid such fees to obtain the service has no recourse against the authorizing agency or the collecting contractor, even though the agency's control over the service makes it *unobtainable from any other source*. For three reasons that emerge in Network Solutions' opposition, the opinion below warrants the attention of the Court.

First, the importance of applying the IOAA in the context of a cooperative agreement is, if anything, even more pronounced than it is where a procurement contract is used. Cooperative agreements are not subject to the Competition in Contracting Act. The user fees at issue were not delimited by the competitive bidding process. Unless user fees charged under the aegis of cooperative agreements are subject to the IOAA, a government contractor may be authorized to charge fees *subject to no legal limitation*. The district court acknowledged the strength of the Registrants' showing that the user fees greatly exceeded the cost of providing the registration services. *See Thomas v. Network Solutions*, 2 F. Supp.2d 22, 37 (1998) (App. 74a). (NSI charges an initial fee of $70, and annual renewal fees of $35, for the domain name registration service that costs less than $1 to perform!) The opinion below encourages executive agencies

to enter cooperative agreements instead of procurement contracts, as the former permit fees for government services to be imposed with impunity, no matter how grossly they exceed costs. This is a message whose broadcast should not be countenanced.

Second, Network Solutions' reliance on the cooperative agreement as a basis for disregarding the IOAA falls through even on its own terms. *See* NSI Opp. at 16 ("The use of a cooperative agreement, rather than a procurement contract, reflects the fact that NSI was acting on its own behalf, and not as NSF's 'agent' . . ."). NSI's argument is refuted by the fact that the 30% portion of the domain name charges that NSI collected *under that same cooperative agreement* was held to be an unconstitutional tax, confirming NSI's status as NSF's agent in collecting the registration charges. The contractual vehicle that did not shield NSF-agent NSI from constitutional scrutiny as a tax collector cannot be used to "privatize" NSI's remaining collections for purposes of the IOAA.

Network Solutions' attempt to distance itself from NSF for purposes of the IOAA issue also runs afoul of NSI's portraying itself as a *federal instrumentality* in order to obtain antitrust immunity. Network Solutions repeatedly conceded, in its December 16, 1997 brief in support of its motion to dismiss, that it acted as NSF's agent in collecting the user fees:

- "In performing registration services and collecting registration fees NSI was at all times acting . . . at the direction and with the approval of the NSF, a Federal Government agency. . . ." [NSI Mem. at 23.]

- "The fees at issue are specifically authorized and directed by the Cooperative Agreement, and they required and received the NSF's explicit approval." [NSI Mem. at 26.]

- "NSI collects this sum [the domain name registration fee] under the authority of its agreement with the NSF and as directed by the NSF." [NSI Mem. at 30.]

Third, as these concessions show, it is baseless for NSI to contend that domain name registration "does not involve [government] services provided by an agency." *See* NSI Opp. at 13. NSI's reliance upon NSF's counsel's *argument* at a hearing (" . . . never, never been a Government function, ever") confirms the invalidity of NSI's characterization. *See* NSI Opp. at 14. Even though the Internet itself may be unregulated, the Government today retains the same complete control over the services at issue here — the registration of critical top-level (e.g., *.com*) domain names — that it has always had. Indeed, the very fact that the Government is presently seeking to increase the "privatization" of domain name registration reflects the Government's longstanding control over it.

It is, in sum, nothing short of extraordinary that the courts below discarded the IOAA based on the fact that the service in question is provided by NSF's agent, instead of by NSF itself. The opinion below stands as a blueprint for agency evasion of statutory constraints on its authority. This too is an issue of unquestionable constitutional significance, and the Court should therefore grant the petition for certiorari to resolve it.

## CONCLUSION

For the reasons stated herein and for the reasons stated in the petition for a writ of certiorari, the Registrants' respectfully request that their petition be granted.

Respectfully submitted,

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